A

ASEAN BINTULU FERTILIZER SDN BHD v. WEKAJAYA SDN BHD & ANOTHER APPEAL

COURT OF APPEAL, PUTRAJAYA
HAMID SULTAN ABU BACKER JCA
UMI KALTHUM ABDUL MAJID JCA
B SURAYA OTHMAN J
[CIVIL APPEALS NO: W-02(C)(A)-1075-06-2016
& W-02(C)(A)-1076-06-2016]
20 OCTOBER 2017

C ***ARBITRATION:*** *Award – Setting aside – Application on grounds of public policy – Delay of four years to hand down award – Whether claimant suffered material prejudice – Arbitrator delivered speaking award – Whether delay issue could be sole reason for appellate intervention – Whether issue of delay could be determined in application for setting aside of award – Whether delay compromised decision*
D *making process of arbitrator – Whether warranted intervention based on public policy – Arbitration Act 2005, s. 37*

ARBITRATION: *Award – Setting aside – Application under s. 42 of Arbitration Act 2005 – Test for court's intervention – Whether s. 42 required higher threshold – Whether claimant made out case for application of s. 42 – Whether appellate*
E *intervention warranted*

The appellant ('ABF') was the employer and the respondent was the contractor who was engaged to construct a urea storage building. A dispute arose between the parties and the matter was referred to arbitration in the
F year 2003, at a time when the Arbitration Act 1952 ('AA 1952') was in force. The final award which was delivered on 26 December 2014 was in favour of the respondent. Dissatisfied with the final award, ABF applied to the High Court to set it aside: (i) under s. 37 of the Arbitration Act 2005 ('AA 2005') on the ground of public policy in that the arbitrator had taken four years to hand down his award; and (ii) under s. 42 of the AA 2005. The High Court
G also decided in favour of the respondent and hence, these appeals. It was ABF's submission, *inter alia*, that (i) the four years delay in delivering the award had compromised the decision-making process *ie*, 'there could be possibilities of misrecollections' by the arbitrator; (ii) the delay in delivering the award was injurious to public good and violated the forum's most basic
H notion of justice; (iii) the delay in the award with a pre-award interests had amounted by itself to RM10.9 million; and (iv) even though it was ad hoc arbitration, the present Kuala Lumpur Regional Centre for Arbitration ('KLRCA') Rules requires the award to be delivered within three months with provisions for extension.

I

Held (dismissing both appeals with costs)
Per Hamid Sultan Abu Backer JCA delivering the judgment of the court:

(1) An arbitrator being a professional and having agreed to a fee for his engagement is contractually obliged to subscribe to the doctrine of good practice, such as independence, impartiality, accountability, transparency, good governance, *etc*, and very importantly intellectual honesty. An arbitrator who is not able to perform his engagement within the reasonable expectation of the parties, ought to disclose it at the earliest opportunity, failing which it will impinge on the doctrine of good practice as well as ethics and can be a subject matter for parties to bring an action in contract as well as many areas of tort inclusive of tort of deceit. (para 12)

(2) Section 47 of the AA 2005 gives immunity to the arbitrator for misconduct to some extent. Malaysian law also does not have a disciplinary mechanism for arbitrators coming from the panel of institutional bodies such as the KLRCA to check the integrity of arbitration process, the arbitrator as well as the award. Thus, the arbitrator in Malaysia is protected and his conduct in arbitration proceedings, in a limited sense, cannot be challenged unless bad faith can be established. The issues of delay could not be determined in an application for setting aside of the award unless it can be demonstrated that the delay has, in actual fact, compromised the decision-making process of the arbitrator, warranting the court to intervene based on public policy. (paras 14 & 16)

(3) The curial scrutiny of the complaint in relation to s. 37 as well as s. 42 taken by the High Court demonstrated that ABF did not suffer any material prejudice and some relief was provided by amending the interest provision. The complaint of pre-award interest on the face of record might look unjust but it being loss for use of money for the respondent at the market rate could not be unjust or abhorrent to the notions of justice to seek the court's intervention in a party autonomy concept and also in the light of s. 36 of the AA 2005. The withholding of money by the ABF, though no fault of its own in commercial sense, might have been advantageous to the ABF and a loss to the respondent. (para 17)

(4) The delay issue could not be the sole reason for the appellate intervention when the arbitrator had delivered a speaking award within the contemplation of the law. The court's unfettered discretion under the AA 1952 to intervene to set aside the award has been curtailed by AA 2005. Therefore, an application under s. 37 on public policy ground or purely delay point and speculative attack on the decision-making process, would be a non-starter. (paras 18 & 19)

(5) The issues relating to s. 42 of the AA 2005 required a high threshold to meet. The test for intervention will relate to cases where the award suffers from patent injustice and/or where the award is manifestly unlawful and unconscionable. Usually the consideration which need to be taken into account at the initial stage itself will include whether (i) the point of law attempted to be raised will have substantial effect on the arbitration; (ii) the point have been raised before the arbitrator; (iii) the arbitrator's decision must be obviously wrong or the question must be of general public importance and open to serious doubt; and (iv) it must be just and proper for the court to determine the question. ABF had not made out a case for s. 42 to apply. (para 22)

Bahasa Malaysia *Headnotes*

Perayu ('ABF') adalah majikan dan responden adalah kontraktor yang dilantik untuk membina bangunan menyimpan urea. Pertikaian timbul antara pihak-pihak dan perkara tersebut dirujuk pada timbang tara dalam tahun 2003, semasa Akta Timbang Tara 1952 ('Akta 1952') masih berkuat kuasa. Award akhir yang dibuat pada 26 Disember 2014 memihak pada responden. Tidak berpuas hati dengan award akhir, ABF memohon kepada Mahkamah Tinggi untuk mengetepikannya: (i) bawah s. 37 Akta Timbang Tara 2005 ('Akta 2005') atas alasan polisi umum di mana penimbang tara telah mengambil masa empat tahun untuk menyampaikan awardnya; dan (ii) bawah s. 42 Akta 2005. Mahkamah Tinggi juga memutuskan memihak pada responden dan dengan itu, rayuan-rayuan ini. Hujahan ABF, antara lain, adalah bahawa (i) kelewatan selama empat tahun dalam menyampaikan award menjejaskan prosiding pembuatan keputusan iaitu, 'terdapat kemungkinan kekaburan ingatan' oleh penimbang tara; (ii) kelewatan dalam menyampaikan award memudaratkan kepada kebaikan umum dan melanggar tanggapan keadilan paling asas forum tersebut; (iii) kelewatan dalam award dengan faedah sebelum award sahaja telah membentuk sejumlah RM10.9 juta; dan (iv) walaupun ia adalah timbang tara secara ad hoc, Kaedah-Kaedah Pusat Penimbang Tara Serantau Kuala Lumpur ('KLRCA') memerlukan award disampaikan dalam tempoh tiga bulan dengan peruntukan untuk lanjutan.

Diputuskan (menolak kedua-dua rayuan dengan kos)
Oleh Hamid Sultan Abu Backer HMR menyampaikan penghakiman mahkamah:

(1) Seorang penimbang tara sebagai seorang profesional dan setelah bersetuju dengan fi bagi lantikannya bertanggungjawab secara kontrak untuk mematuhi doktrin amalan baik, seperti kebebasan, keadilan, kebertanggungjawaban, transparensi, kepemerintahan baik, dan lain-lain dan lebih penting lagi kejujuran intelek. Seorang penimbang tara yang tidak mampu melaksanakan pelantikannya dalam harapan munasabah

pihak-pihak, wajar mendedahkannya pada peluang yang terawal, dan kegagalannya akan mencerobohi doktrin amalan baik dan juga etika dan boleh menjadi perkara bagi pihak-pihak memulakan tindakan kontrak dan bahagian tort lain termasuk tort bagi penipuan.

(2) Seksyen 47 Akta 2005 memberikan keimunan sehingga peringkat tertentu. Undang-undang Malaysia juga tidak mempunyai mekanisme disiplin bagi penimbang tara-penimbang tara dari panel badan institusi seperti KLRCA untuk memantau integriti proses timbang tara, penimbang tara dan juga award. Oleh itu, penimbang tara di Malaysia dilindungi dan tindakannya dalam prosiding timbang tara, dalam maksud yang terhad, tidak boleh dicabar kecuali niat jahat dibuktikan. Isu-isu kelewatan tidak boleh ditentukan dalam permohonan pengetepian award kecuali boleh ditunjukkan bahawa kelewatan tersebut, pada hakikatnya, memudaratkan proses pembuatan keputusan penimbang tara, yang mewajarkan campur tangan mahkamah berdasarkan polisi umum.

(3) Penelitian penyelesaian aduan berkaitan s. 37 dan juga s. 42 yang dibuat oleh Mahkamah Tinggi menunjukkan bahawa ABF tidak terjejas secara besar dan sedikit relief diberikan dengan meminda peruntukan bagi faedah. Aduan mengenai faedah sebelum award secara zahirnya mungkin kelihatan tidak adil tetapi oleh sebab ia adalah bagi kehilangan kegunaan wang bagi responden pada kadar pasaran tidak mungkin menjadi tidak adil atau amalan yang dibenci terhadap tanggapan keadilan untuk memohon campur tangan mahkamah dalam konsep kuasa autonomi pihak-pihak dan juga berikutan s. 36 Akta 2005. Penahanan wang oleh ABF, walaupun bukan salahnya sendiri dalam maksud komersial, mungkin memberikan faedah kepada ABF dan merugikan responden.

(4) Isu kelewatan tidak boleh menjadi satu-satunya alasan bagi campur tangan rayuan apabila penimbang tara telah menyampaikan 'speaking award' dalam jangkaan undang-undang. Budi bicara mahkamah yang tidak terbelenggu untuk mengetepikan award bawah Akta 1952 telah dihadkan oleh Akta 2005. Oleh itu, penggunaan bawah s. 37 atas alasan polisi awam atau semata-mata atas alasan kelewatan dan serangan secara spekulasi atas proses pembuatan keputusan, bukan pemula.

(5) Isu berkaitan s. 42 Akta 2005 memerlukan nilai ambang yang tinggi dipenuhi. Ujian bagi campur tangan akan berkait pada kes-kes di mana award mengalami ketidakadilan jelas dan/atau di mana award adalah jelas tidak sah dan tidak berpatutan. Biasanya pertimbangan yang diambil kira pada peringkat awal sendiri akan termasuk sama ada (i) isu undang-undang yang cuba ditimbulkan akan mempunyai kesan yang besar pada timbang tara; (ii) isu tersebut telah ditimbulkan di hadapan

penimbang tara; (iii) keputusan penimbang tara mesti jelas salah atau soalan tersebut mestilah berkepentingan umum dan terbuka pada keraguan serius; dan (iv) adil dan munasabah bagi mahkamah mempertimbangkan soalan tersebut. ABF tidak membuktikan kes bagi pemakaian s. 42.

Case(s) referred to:

Asean Bintulu Fertilizer Sdn Bhd v. Wekajaya Sdn Bhd & Another Case [2016] 1 LNS 1089 HC ***(refd)***

BV Scheepswerf Damen Gorinchem v. Marine Institute [2015] EWHC 1810 (Comm) ***(refd)***

Channel Tunnel Group Ltd v. Balfour Beatty Construction Ltd (HL) [1993] 1 All ER 664 ***(refd)***

Lesotho Highland Development Authority v. Impregilo Spa [2005] UKHL 43 ***(refd)***

Monie v. Commonwealth of Australia [2005] NSWCA 25 ***(refd)***

Petronas Penapisan (Melaka) Sdn Bhd v. Ahmani Sdn Bhd [2016] 3 CLJ 403 CA ***(refd)***

PT Asuransi Jasa Indonesia (Persero) v. Dexia Bank SA [2007] 1 SLR 597 ***(refd)***

Legislation referred to:

Arbitration Act 2005, ss. 36, 37(6), 42, 47

Other source(s) referred to:

No Nonsense: The Authorised Biography of Zaki Azmi, *The 12th Chief Justice of Malaysia*, pp 11 & 12

For the appellant - Wong Kah Hui & Raja Yasmin; M/s Kadir, Andri & Partners

For the respondent - Rajendra Navaratnam & Mak Hon Pan; M/s Azman Davidson & Co

[Editor's note: For the High Court judgment, please see Asean Bintulu Fertilizer Sdn Bhd v. Wekajaya Sdn Bhd & Another Case [2016] 1 LNS 1089 (affirmed).]

Reported by S Barathi

JUDGMENT

Hamid Sultan Abu Backer JCA:

[1] The two appeals arising from the same award was fixed for hearing before us on 19 June 2017. They are appeal No. W-02(C)(A)-1075-06-2016 which relates to s. 37 of Arbitration Act 2005 (AA 2005) and appeal No. W-02(C)(A)-1076-06-2016 relates to s. 42 application.

[2] The learned trial judge had written a meticulous judgment setting out the law and facts in great detail. In addition, the learned judge had taken upon himself to exercise a curial scrutiny of the issues related to s. 42 application as though it was an appeal related to a judgment of the court. In doing so, the learned judge had justified the reasons for sustaining the award and also to the amendment of the award and that part of the judgment reads as follows:

> [157] In a reference under s. 42 on a question of law, unlike a setting aside under s. 37 AA 2005, this Court is permitted to vary part of an Award as may be affected by the error of law that has been proved to have applied to the calculation of interest here. To allow double

interest to be charged would be to perpetuate an injustice on ABF and would be unconscionable in the circumstances of the case as interest on the Debit Notes was already charged at 1.5% per month on all overdue accounts. This is an error of law that satisfies that requirement under s. 42 AA 2005 wherein this Court would be constrained to excise the part of the award of interest affected and to leave intact the unaffected part.

[158] I had therefore ordered that the interest of 8% per annum simple interest on the Financial Charges be varied such that interest at 8% per annum simple interest should only run on the Financial Charges of RM4.631,647.37 from 1 December 2006 to 1 August 2012 and thereafter at 5% per annum simple interest until actual realisation and not from 31 March 2003. I also allowed costs of RM10,000.00 to ABF.

[3] The application under s. 37, principally based on public policy was dismissed by the learned trial judge, notwithstanding there was a serious complaint of delay by the learned arbitrator in delivering the award.

[4] After hearing the submissions, we directed further submissions and reserved our judgment to a date to be fixed.

Brief Facts

[5] The facts of the case are not complicated but for the issues to be determined by the learned arbitrator naturally requires great skill and knowledge, though there cannot be any justification for the delay in delivering the award. The delay complained of is about four years to deliver the award. The period taken from the commencement of the arbitration proceedings to the delivery of the award was about ten years. The delay complained of in this case is a classic example for stakeholders to push for legislative measures to check misconduct of arbitrators to preserve the integrity of the arbitration process and enhance the growth of domestic as well as international arbitration. We will deal with the issue of delay and injustice complained of shortly.

[6] We do not wish to repeat the facts of the case in any detail as it has been dealt with by the learned judge in a 108 pages judgment. The judgment is reported as *Asean Bintulu Fertilizer Sdn Bhd v. Wekajaya Sdn Bhd & Another Case* [2016] 1 LNS 1089. This judgment must be read together with that judgment to appreciate our grounds in the proper perspective.

[7] We will summarise the facts in our own words as follows:

(a) The appellant is the employer and the respondent is the contractor who was engaged to construct urea storage building;

(b) Dispute arose between the parties and the matter was referred to arbitration in the year 2003 at a time Arbitration Act 1952 was in force;

(c) Ten issues were submitted before the arbitrator and learned judge had summarised them as follows:

> Issue 1: Whether given that the contract provides a Provisional Sum for rock excavation of 25,000 m^3, the Claimant (WSB) is entitled to an extension of time as a result of the discovery of the rock?;
>
> Issue 2: Whether the Respondent (ABF) had misrepresented any material facts or had given any warranty as to the amount of rock on site?;
>
> Issue 3: Whether the parties had agreed to an extension of time to 20 July 2002 based on excavation of 16,000 m^3 of rock only?;
>
> Issue 4: Whether there are any other events of delay that would entitle the Claimant (WSB) to an extension of time beyond 20 July 2002?;
>
> Issue 5: If the above question is answered in the affirmative, whether the extension of time to July 2002 adequately takes into consideration these other events of delay?;
>
> Issue 6: Whether the delays to the completion of the Works were caused by or contributed to by WSB?;
>
> Issue 7: Whether if WSB is entitled to an extension of time to July 2002 (or to another date) the amount of prolongation costs that the Claimant WSB is entitled to?;
>
> Issue 8: Whether apart from the claim for prolongation costs, WSB is entitled to any of its other claims?;
>
> Issue 9: Whether if WSB is only entitled to extension of time to July 2002, ABF is entitled to claim for liquidated damages for the delay caused by WSB?;
>
> Issue 10: Whether ABF is entitled to the increased costs of completing the works?"

(d) The submission ended in 2009 and the final award was delivered on 26 December 2014.

(e) The award was in favour of the claimant/respondent and reads as follows:

1. That ABF shall pay the sum of RM12,342,185.29 to WSB;
2. That ABF shall pay interest at the rate of 8% simple interest per annum on the sum of RM12,342,185.29 from 31 January 2003 to WSB to 1 August 2012;
3. Thereafter ABF shall pay interest at the rate of 5% simple interest per annum on the sum of RM12,342,185.29 from 2 August 2012 until the actual realisation of the said payments;
4. That ABF shall bear and pay WSB's costs of this Arbitration on a party and party basis;

5. That ABF shall pay the costs of the Award,

6. That all other requests and claims of WSB and ABF are rejected.

(f) The particulars of the award sum of RM12,342,185.29 read as follows:

(a) Value of work done and variations:	RM 3,259,666.22
(b) Loss of profit from omission of works:	RM 90,277.39
(c) Financial charges:	RM 4,631,647.37
(d) Prolongation costs:	RM 4,360,594.31
Total	RM12,343,185.29

[8] The memorandum of appeal in appeal "No. 1075" reads as follows:

1. The Learned High Court Judge erred in law and in fact in refusing to intervene to set aside the arbitration award despite the fact that the Arbitrator had made his findings without credible evidence. In this regard, the Learned High Court Judge erred in fact and in law when he failed to consider the following:

   (a) That the Arbitrator was clearly wrong to hold that the Respondent is entitled to financial charges amounting to RM 4,631,647.37 when there was no evidence to support any such claim or that the Respondent had in fact suffered any such loss.

   (b) That it is clear from the witness statements filed in the arbitration that the Respondent's claim for financial charges is not based on the audited accounts but rather based on an internal statement of accounts.

   (c) That in any event, the Respondent did not call the auditor as a witness at the arbitration to explain its auditor's report which does not explain the interest rate applicable for financial charges.

   (d) That it simply does not make sense as to how financial charges can amount to RM 4,631,647.37 for the disputed extended contract period of 14 months which amounts to close to 40% of the contract value.

   (e) That the invoice tendered by the Respondent does-not prove that it had incurred those monies.

   (f) That the Respondent had not tendered any evidence to prove that it incurred losses in the form of financial charges amounting to RM4,631,647.37.

2. The Learned High Court Judge erred in law and in fact in refusing to intervene to set aside the arbitration award despite there being clear errors made by the Arbitrator as a result of delay of approximately 4 years in publishing the arbitration award. In this regard the Learned High Court Judge has erred in fact and in law when he failed to appreciate the following:

A

(a) That the arbitrator took a period of 4 years from the close of submissions to issue the final award which amounts to an inordinate delay of which no explanation has been given by the arbitrator.

(b) That it is the duty of the arbitrator, an individual whom has been paid a significant amount of monies, to carry out his function as an administrator of justice to issue the arbitration award within a reasonable time.

(c) That the arbitrator was jointly appointed for his expertise with the belief that he will issue his award promptly so that the dispute between the parties can be resolved within a reasonable time.

(d) That it is not for the parties to remind the arbitrator to issue the arbitration award and neither should the parties be obliged to have to take steps to terminate the arbitrator's appointment.

(e) That the risks of reminding an arbitrator are obvious and the option of terminating the appointment of the arbitrator means having to go through the entire process once again which is a very time consuming and costly affair.

(f) That the Kuala Lumpur Regional Centre for Arbitration's Arbitration Rules provides that an award must be issued within 3 months from the close of pleadings unless time has been extended.

(g) That once there has been a significant delay in the issuance of the arbitration award, the said award cannot be accorded the same deference of that of an award which is issued promptly.

(h) That given the limited grounds on which an arbitration award can be set aside, this presumes that an award has been properly and properly issued by the arbitrator and the delay (of 4 years) in the issuance of an award, cannot be accepted as it is contrary to not only what the parties expect and is against the public policy of law of arbitration in Malaysia.

(i) That the arbitrator could not have properly evaluated the evidence, 4 years after close of submissions and 5 years after the evidence was recorded.

3. That the Learned High Court Judge failed to appreciate that the failure of the Respondent to provide adequate evidence or a failure to meet the necessary standard of proof is a ground to set aside an arbitration award.

4. That the Learned High Court Judge for reasons set out above failed to appreciate that the arbitration award should be set aside on the grounds of public policy.

[9] The memorandum of appeal in appeal "No. 1076" reads as follows: A

1. The Learned High' Court Judge erred in law and in fact in dismissing the following questions of law put before him:

   (a) Question 1: Whether given that the contract provides a provisional sum for rock excavation of 25,000 m^3, was the Respondent entitled to an extension of time as a result of the discovery of rock? B

   (b) Question 2: Whether as a matter of law if the contract requires a party to inspect the site, can it derogate its responsibilities by relying on the alleged representations made by other parties?

   (c) Question 4: Whether if the Arbitration Act 1952 is silent on the issue of the granting of pre-award interest, does the arbitrator has the powers to grant pre-award interest? C

2. The Learned High Court Judge erred in law and in fact in not answering Question 1 in the negative. In this regard, the Learned High Court Judge erred in law and in fact when he failed to consider the following: D

   (a) That a provisional sum is in respect of works which cannot be sufficiently defined or properly evaluated at the time when the contract is evaluated.

   (b) That the Respondent had agreed to excavate the amount of hard rock based on the unit rates as agreed. E

   (c) That when, the Respondent entered into the contract, the Respondent was aware that there was a potential need to carry out rock excavation but the amount of rock that was to be extracted was unclear and it is for this reason the value of these works were treated as provisional. F

   (d) That the arbitrator was wrong to find that there was a separate contract.

   (e) That the Respondent is not entitled to any extension of time in carrying out provisional works. G

   (f) That the Respondent should have factored these provisional works into the work program and catered for the possibility of carrying out these works.

   (g) That the Respondent not to ask for the provisional sum item to be removed and it remained as part of the contract. H

   (h) That the arbitrator's analysis on this issue is simply incorrect and the conclusion which he reaches when finding that the Respondent is entitled to more time for a provisional sum item is simply preposterous. I

A

(i) That this was not a variation or new works that were ordered by the Appellant and these works are part of the Respondent's original scope of works and all that needed to be determined is the amount of rock that the Respondent needed to extract from the site.

B

3. The Learned High Court Judge erred in law and in fact in not answering Question 2 in the negative. In this regard, the Learned High Court Judge erred in law and in fact when he failed to consider the following:

(a) That there is a specific contractual clause which deals with the issue of the amount of rock to extract and the applicable rate, which means that there is no basis for alleging that there was an act for misrepresentation or collateral warranty.

C

(b) That there is an entire contract clause and the entire contract clause operates to exclude all allegations of misrepresentation and collateral warranties.

D

(c) That the Respondent was expressly requested in the tender bid documents to satisfy themselves as to the site conditions. They failed to do so and instead claim that as a result of the mediation that there was no need for them to carry out the necessary site investigation.

E

(d) That the arbitrator was wrong in arriving at the conclusion that there was an act of misrepresentation or a collateral warranty.

(e) That the failure of the arbitrator to consider the relationship between the various relevant clauses in the contract resulted in him arriving at a conclusion which contradicted the applicable law and the terms of the agreement between the parties

F

4. The Learned High Court Judge erred in law and in fact in not answering Question 4 in the negative. In this regard, the Learned High Court Judge erred in law and in fact when he failed to consider the following:

G

(a) That when the arbitration award was issued, the Arbitration Act 1952 was repealed and no longer applicable. The arbitrator therefore could not have awarded interest pursuant to the provisions of the Arbitration Act 1952.

(b) That at the point of issuing the award, the applicable law was that of the Arbitration Act 2005 and the Court of Appeal in the decision of *Far East Holdings Bhd & Anor v. Majlis Ugama Islam dan Adat Resam Melayu Pahang* (Civil Appeal No. W-02(NCC)(A)-2672-12/2013) ruled that the arbitrator does not have the necessary power to grant pre-award interest that is the grant of pre award interest from January 2003 to December 2014 amounting to approximately RM10 million is bad in law.

H

I

(c) That the savings provision found in Section 51 of the Arbitration Act 2005 does not deal with the powers of the arbitrator but rather is limited to issues pertaining to the arbitration agreement and the arbitration proceedings. As such, the power to award interest falls within the purview of the Arbitration Act 2005.

(d) That in any event, it is debatable whether the Arbitration Act 1952 granted the arbitrator the power to grant pre-award interest. It does not appear to be the case.

(e) That the relevant sections pertaining to the award of interest in the Arbitration Act 1952 and the Arbitration Act 2005 are similar. As such, a similar interpretation should be given to Section 33 of the Arbitration Act 1952 with regard to the power to grant pre-award interest.

(f) That the decisions which have previously considered the issue of allowing pre-award interest pursuant to the Arbitration Act 1952 have failed to recognise that once there is a statutory provision, common law cannot be imported to interpret that particular section or statute.

(g) That the power to grant interest post-award is expressly provided for in the Arbitration Act 1952 but there is no such provision in relation to pre-award interest. Therefore Parliament (as with the 2005 Act) has deliberately chosen to exclude the power of the arbitrator to grant pre-award interest.

(h) That as a result of the delay in issuing the award, the Appellant is being penalised by interest. The Appellant cannot be responsible for the delay of the arbitrator.

5. The Learned High Court Judge erred in law and in fact in refusing to intervene to set aside the arbitration award despite there being clear errors made by the Arbitrator as a result of delay of approximately 4 years in publishing the arbitration award. In this regard the Learned High Court Judge erred in law and in fact when he failed to appreciate the following:

(a) That the arbitrator took a period of 4 years from the close of submissions to issue the final award which amounts to an inordinate delay of which no explanation has been given by the arbitrator.

(b) That it is the duty of the arbitrator, an individual whom has been paid a significant amount of monies, to carry out his function as an administrator of justice to issue the arbitration award within a reasonable time.

(c) That the arbitrator was jointly appointed for his expertise with the belief that he will issue his award promptly so that the dispute between the parties can be resolved within a reasonable time.

(d) That it is not for the parties to remind the arbitrator to issue the arbitration award and neither should the parties be obliged to have to take steps to terminate the arbitrator's appointment.

(e) That the risks of reminding an arbitrator are obvious and the option of terminating the appointment of the arbitrator means having to go through the entire process once again which is a very time consuming and costly affair.

(f) That the Kuala Lumpur Regional Centre for Arbitration's Arbitration Rules provides that an award must be issued within 3 months from the close of pleadings unless time has been extended.

(g) That once there has been a significant delay in the issuance of the arbitration award, the said award cannot be accorded the same deference of that of an award which is issued promptly.

(h) That given the limited grounds on which an arbitration award can be set aside, this presumes that an award has been properly and promptly issued by the arbitrator and the delay (of 4 years) in the issuance of an award, cannot be accepted as it is contrary to not only what the parties expect and is against the public policy of law of arbitration in Malaysia.

(i) That the arbitrator could not have properly evaluated the evidence, 4 years after close of submissions and 5 years after the evidence was recorded.

Delay, Public Policy and Section 37 AA 2005

[10] Learned counsel for the appellant's submission in our own words can be summarised as follows:

(a) Four years delay in delivering the award has compromised the decision-making process ie, 'there could be possibilities of misrecollections' by the learned arbitrator.

(b) Delay in delivering the award is injurious to public good and violates the forum's most basic notion of justice, and relies on the following cases, namely: (i) *BV Scheepswerf Damen Gorinchem v. Marine Institute* [2015] EWHC 1810 (Comm); (ii) *PT Asuransi Jasa Indonesia (Persero) v. Dexia Bank SA* [2007] 1 SLR (R) 597.

(c) The delay in the award with a pre-award interest had amounted by itself to RM10.9 million.

(d) Even though it was ad hoc arbitration, the present Kuala Lumpur Regional Centre for Arbitration (KLRCA) Rules requires the award to be delivered within three months with provisions for extension.

[11] The issue of delay of arbitrators from the commencement of arbitration proceedings till the delivery of the award has been seen as an anathema to the concept of arbitration in many jurisdictions and Malaysia is no exception. Malaysian courts once well known for delay in litigation

process and backlog of cases have come out of the anathema during the regime of Chief Justice Tun Zaki Azmi itself and our administration of expeditious justice has won accolades from the World Bank. (See '*No Nonsense: The Authorised Biography of Zaki Azmi The 12th Chief Justice of Malaysia*' pp. 11 and 12).

[12] An arbitrator being a professional and having agreed to a fee for his engagement is contractually obliged to subscribe to the doctrine of good practice, such as independence, impartiality, accountability, transparency, good governance, etc. and very importantly intellectual honesty. Lack of intellectual honesty is the foundation to corrupt practices which will be abhorrent to the rule of law and justice. An arbitrator who is not able to perform his engagement within the reasonable expectation of the parties, ought to disclose at the earliest opportunity, failing which it will impinge on the doctrine of good practice as well as ethics and can be a subject matter for parties to bring an action in contract as well as many areas of tort inclusive of tort of deceit.

[13] The engagement of arbitrator and the legal remedies against him may not be very different from action related to, for example, construction contracts and delay issues of professionals such as lawyers and doctors. However, s. 47 of AA 2005 gives some limited protection to the arbitrator. Whether it will cover delay issue is debatable. Section 47 reads as follows:

> Liability of arbitrator
>
> 47. An arbitrator shall not be liable for any act or omission in respect of anything done or omitted to be done in the discharge of his functions as an arbitrator unless the act or omission is shown to have been in bad faith.

[14] Basically, s. 47 to some extent gives immunity to the arbitrator for misconduct. The Model Law does not have a similar provision. Thus, the arbitrator in Malaysia is a protected species and his conduct in arbitration proceedings in a limited sense cannot be challenged unless bad faith can be established. Bad faith or good faith is one related to *mens rea* and the issue related to delay and bad faith is one inter-related and it will be within the province of the court to determine the issue in a suitable case and that cannot be done in an application for setting aside of the award unless it can be demonstrated that the delay has in actual fact compromised the decision-making process of the arbitrator warranting the court to intervene based on public policy.

[15] It is well-established in criminal litigation that delay may be a good ground for setting aside conviction and ordering an acquittal or rehearing. In civil and commercial cases, it is rarely done purely on the delay point if the judgment is a speaking judgment reflective of the notes of evidence, exhibits, etc. (See *Monie v. Commonwealth of Australia* [2005] NSWCA 25).

[16] The Model Law concept leans in favour of the arbitrator without provision for disciplinary tribunal and any form of misconduct during the arbitral process or failure of the arbitrator to disclose information which may be material consideration for appointment, etc. may not be strictly within the purview of the court once the award has been made. Malaysian law also does not have a disciplinary mechanism for arbitrators coming from the panel of institutional bodies like KLRCA to check the integrity of arbitration process, the arbitrator as well as the award. Many professional bodies in Malaysia where there is some form of statutory recognition such as for the lawyers or medical practitioners, comes with a disciplinary body to keep in check with the conduct and professionalism of their members to sustain rule of law as well as administration of justice. Arbitrators or adjudicators even appointed by KLRCA are not subject to disciplinary action for conduct, unbefitting of the professional obligation. Countries like India, has amended their Arbitration Act to provide some form of relief to check misconduct. (See Indian Arbitration Amendment Act 2015). For example, India has included a provision for disclosure, ie, (i) circumstances disclosing any past or present relationship with or interest in any of the parties or in relation to the subject matter in dispute, whether financial, business, professional or other kind, which is likely to give rise to justifiable doubts as to the independence or impartiality of the arbitrator; (ii) circumstances which are likely to affect the ability to devote sufficient time to the arbitration and in particular the ability to finish the entire arbitration within the statutory time frame. In addition, it has set out time limits for the award to be delivered and also to penalise the arbitrator on his fees as well as terminate his appointment, if the award is not delivered within the time frame. Such drastic steps have not yet been provided in AA 2005 to control the misconduct of arbitrators. Misconduct of arbitrators will generally undermine the growing arbitration industry as it will compromise administration of justice and rule of law. Our constitutional framework requires it to be checked by legislative measures, to uphold the rule of law.

[17] In the instant case, the learned judge had taken into consideration the delay point and had censored the learned arbitrator. To save the award from being set aside, the learned trial judge had taken a curial scrutiny of the complaint in relation to s. 37 as well as s. 42 to sustain the award, thereby demonstrating that the appellant did not suffer any material prejudice. The learned judge had also provided some relief by amending the interest provision. The complaint of pre-award interest on the face of record may look unjust but it being loss for use of money for the respondent at the market rate cannot be unjust or abhorrent to the notions of justice to seek court intervention in a party autonomy concept and also in the light of s. 36 of AA 2005. The withholding of that money by the appellant, though no fault of its own in commercial sense, may have been advantageous to the appellant and a loss to the respondent. (See *Channel Tunnel Group Ltd v. Balfour Beatty Construction Ltd (HL)* [1993] 1 All ER 664; *Lesotho Highland Development Authority v. Impregilo Spa* [2005] UKHL 43].

[18] In our view, the delay issue cannot be the sole reason for appellate intervention when in the instant case, the learned arbitrator had delivered a speaking award within the contemplation of the law.

[19] Under the old regime ie, AA 1952, the court had unfettered discretion to intervene to set aside the award. This wide discretion has been curtailed by AA 2005. Now that, that discretion has been curtailed an application under s. 37 on public policy ground or purely delay point and speculative attack on the decision-making process, in our view will be a non-starter. Our reasons *inter alia* are as follows:

(a) Section 37 as a whole does not give a free hand to the courts to set aside the award based on public policy or breach of natural justice purely on a delay issue.

(b) There are limited procedural mechanism to address the delay issue under AA 2005 and/or to preserve the integrity of arbitral process to some extent. The appellant has not resorted to any of those measures and it is too late to address the delay issue and allow the award to be set aside.

(c) Section 37 itself qualifies the rights of the applicant by saying the court 'may' and not shall. The threshold test to satisfy any of the provision of the said section generally must be to do with patent injustice on the face of the record and one where the award cannot be saved by sending it back to the arbitrator for reconsideration. (See s. 37(6) AA 2005).

(d) Section 36 will fortify the argument that the award is final and binding on the parties. Section 36 provision is not found in the Model Law. Section 36 places a higher threshold on the court when it intends to set aside an award related to a s. 37 application. In this respect, the decision from other jurisdiction which does not have a similar provision will not be helpful, save those cases which had dealt with the jurisprudence relating to 'patent injustice' or unconscionability, etc. Section 36 of the Act reads as follows:

> An award is final and binding
>
> 36. (1) An award made by an arbitral tribunal pursuant to an arbitration agreement shall be final and binding on the parties and may be relied upon by any party by way of defence, set-off or otherwise in any proceedings in any court.
>
> (2) The arbitral tribunal shall not vary, amend, correct, review, add to or revoke an award which has been made except as specifically provided for in section 35.

[20] For reasons stated above, we do not think it is a proper exercise of appellate function to intervene in the decision of the learned judge in relation to appeal "No. 1075".

[21] In relation to appeal "No. 1076", the learned trial judge has summarised the issues as follows:

A. Where a construction contract includes a Provisional Sum item whether the contractor can claim an extension of time if it carries out these provisional sum works?

B. Whether as a matter of law if the contract requires a party to inspect the site, can it derogate its responsibilities by relying on the alleged representations made by other party?

C. Whether pursuant to the Arbitration Act 1952 ("AA 1952"), the Arbitrator is correct in law to grant the Respondent pre-award interest amounting to RM10,975,407.69?

D. Whether if the AA 1952 is silent on the issue of the granting of pre-award interest, does the Arbitrator have the powers to grant pre-award interest?

[22] We do not wish to labour on the issues related to s. 42 as it requires a high threshold to meet and this was explained in great detail by the Court of Appeal in *Petronas Penapisan (Melaka) Sdn Bhd v. Ahmani Sdn Bhd* [2016] 3 CLJ 403. The test for intervention will relate to cases where the award suffers from patent injustice and/or where the award is manifestly unlawful and unconscionable. Usually, the consideration which needs to be taken into account at the initial stage itself will include whether (i) the point of law attempted to be raised will have substantial effect on the arbitration; (ii) the point have been raised before the arbitrator; (iii) arbitrator's decision must be obviously wrong or the question must be of general public importance and open to serious doubt; (iv) it must be just and proper for the court to determine the question. The learned judge as we had said earlier, to save the award, had taken the initiative to comb the award to justify the award should stand save for the adjustment related to interest. We do not think the appellant had made out a case for s. 42 to apply.

[23] For reasons stated above, we take the view that appellate intervention is not warranted and the appeal "No. 1076" must be dismissed *in limine*.

[24] Both the appeals are dismissed with costs, subject to payment of allocatur fees. Deposits are to be refunded. We will now hear the parties on the issue of costs.

We hereby order so.